Supreme Court of Iowa.

PORTER *v.* POWELL.

The duty of a parent to furnish necessaries for his infant children, is both a legal and a moral one; and a promise to pay for necessaries supplied to such children by a third person, will be implied from such legal duty.

A child may be emancipated from the duty of service to the parent, yet such emancipation will not relieve the parent from the duty to care for, and control such child, nor from liability for necessaries, such as physician's services, even though furnished without the knowledge of the parent.

BECK, J., dissenting.

Appeal from the District Court of Dallas County.

The District Court certifies to this Court the following question, upon which it is desirable to have the opinion of the Supreme Court:

Is a father legally liable to a physician for the latter's services in professionally treating the minor daughter of said father, dangerously attacked with typhoid fever, who, at the date of said treatment, was seventeen years of age, and was then, and had been, residing away from her father's house for three years prior to the rendition of said services, earning and controlling her own wages, and providing herself with clothing, at a place thirty miles distant from her father's place of residence, the father not furnishing, or agreeing with his daughter to furnish, her with any money, or means of support, but consenting to her absence from home; the said professional services being rendered at the request of the said minor daughter, but were rendered and furnished without the procurement, knowledge, or consent of the defendant, and without knowledge of the sickness, until demand was made for payment of said services by plaintiff, the attendance of plaintiff being from day to day, for a period of twenty days?

W. W. Cardell and *R. S. Barr*, for appellant.

Parsons & Perry and *D. W. Wooden*, for appellee.

GIVEN, J., January 29, 1890. 1. Appellant's contention is that the obligation of parents to support their minor children is only a moral one, and is not enforceable in the absence of statute or promise; that such promise is not to be implied from mere moral obligation, nor from the statute providing

for the reimbursement of the public; and that an omission of duty, from which a jury may find a promise by implication of law, must be a legal duty, capable of enforcement by process of law. At first glance, this view of the law seems opposed to our natural sense of justice; yet it is not without support in the authorities. Such is held to be the law in New Hampshire and Vermont. See *Kelley* v. *Davis* (1870), 49 N. H. 187; *Farmington* v. *Jones* (1858), 36 Id. 271; *Gordon* v. *Potter* (1845), 17 Vt. 348. A different doctrine has long since been held in this State. In *Dawson* v. *Dawson* (1861), 12 Iowa 513, this Court held that "the duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty." In *Johnson* v. *Barnes* (1886), 69 Iowa 641, which was an action by the mother, who had been divorced, against the father, for support furnished their children, the Court say:

> As there was no promise, the question to be determined is whether one can be inferred in favor of a wife, who supports her child, as against her husband, who has without cause abandoned her and his child. The obligation of parents to support their children at common law is somewhat uncertain, ill defined, and doubtful. Indeed, it has been said that there is no such obligation. * * But we are not prepared to say that this rule has been adopted in this country, and it should be conceded, we think, that, independent of any statute, parents are bound to contribute to the support of their minor children, and that such obligation rests mainly on the father, in the absence of a statute, if of sufficient ability; and that, in favor of a third person, who supports a child, a promise to pay may and should be inferred on the ground of the legal duty imposed.

In *Van Valkinburgh* v. *Watson* (1816), 13 Johns. (N. Y.) 480, it is said:

> A parent is under a natural obligation to furnish necessaries for his infant children; and, if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent.

In 5 Wait, Act. & Def. 50, the author says:

> The duty of parents to support, protect, and educate their offspring is founded upon the nature of the connection between them. It is not only

a moral obligation, but it is one which is recognized and enforced by law. * * In order to hold the person liable in any case for goods furnished, either actual authority for the purchase must be shown, or circumstances from which such authority may be implied. * * The legal obligation of parents in respect to support, extends only to those things which are necessary, and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them.

Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed.

2. It is further contended on behalf of appellant that the facts certified show an emancipation of his daughter, such as to relieve him from liability for the services sued for; that support and services are reciprocal duties, and if one is withheld the other may be withdrawn. Parents are entitled to the care, custody, control, and services of their children during minority. To emancipate is to release; to set free. It need not be evidenced by any formal or required act. It may be proven by direct proof or by circumstances. To free a child, for all the period of minority, from care, custody, control, and service would be a general emancipation; but to free him from only a part of the period of minority, or from only a part of the parent's rights, would be limited. The parent, having the several rights of care, custody, control, and service during minority, may surely release from either without waiving his right to the other, or from a part of the time without waiving as to the whole. A father frees his son from service. That does not waive the right to care, custody, and control, so far as the same can be exercised consistently with the right waived. He frees his son of eighteen from service for one year. That does not waive the right to his services after the year; and if the waiver has been for an indefinite period, the parent may assert his right

to the services of the child at any time within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services.

In the law of contracts, where a father expressly or impliedly, by his conduct, waives his right generally to the services of a minor child, such child is said to be emancipated. The child may sue, under such circumstances, on such contracts as are made with him for his services: *Nightingale* v. *Withington* (1818), 15 Mass. 272; *McCoy* v. *Huffman* (1827), 8 Cow. (N. Y.) 84; *Stiles* v. *Granville* (1850), 6 Cush. (Mass.) 458; Schouler, Dom. Rel. § 267. There is nothing in these authorities, nor any reason, against the view expressed, that emancipation may be general or limited. There is no direct evidence as to the purpose of the defendant with respect to his daughter; but we are to say, from the circumstances shown, whether they evidence either a general or limited emancipation. The case of *Everett* v. *Sherfey* (1855), 1 Iowa 358, is relied upon. That was an action to recover damages of the defendant for having harbored and retained the plaintiff's minor son in his employ. The issues and circumstances were quite different from those certified in this case. The Court say:

> There could be no such harboring as would render the defendant liable to the father in this action, if the son was in truth emancipated, and, if the son was not emancipated, it will still be a question whether there was such harboring as renders the defendant liable. By "emancipation," in this connection, we understand such act of his father as sets the son free from his subjection, and gives him the capacity of managing his own affairs as if he was of age.

The following is given as a condensed statement of the facts:

> In the spring or summer of 1852, plaintiff's son, a minor of the age of seventeen, went to reside at defendant's house, and was then and afterwards employed by him as a hired hand for over one year; the defendant paying the son full wages for his services. In February, 1853, plaintiff sued defendant to recover for the services, in which suit the judgment was for the defendant. The son was of a dissatisfied and roving disposition, careless and improvident in his habits, not under parental control, and, either through willfulness or negligence, had not received the educa-

tion proper for a person of his age and condition. In December, 1851, a misunderstanding arose between the parent and the child, which resulted in the son's leaving home, and residing and working at various places, before he went into the defendant's service. After said December, 1851, the father did not, apparently, have or exercise the proper and necessary control and authority over the said minor that a parent of a well-regulated family ought and should exercise, and permitted and sanctioned the hiring out of said minor at various places, and at different employments, away from home; but who made the contracts, or received the pay, is not stated nor proven. The father had also stated that he had no control over his son, and had in some instances waived his authority over him. It also appears that on the eleventh of September, 1852, the plaintiff, by publication in a newspaper, forewarned all persons from crediting his said son on his account, avowing also therein, that he would pay no debts of his contracting, and that he would not fulfill any contracts, or pay debts, entered into by him.

The Court say:

From these circumstances, to mention none others, we think the Court might fairly conclude there was a manumission or emancipation up to the time above stated, and that there was no liability for giving the son shelter, residence, and a home. At least, we think it so fairly deducible from the facts that we should not disturb the conclusion.

The circumstances disclosed in this case are these: The defendant's daughter, at the age of fourteen, went to reside away from her father's house, at a place thirty miles distant, where for three years she contracted for, earned, and controlled her own wages, and provided herself with clothing, her father consenting thereto; he not furnishing, or agreeing to furnish, her with any money, or means of support. That, while thus absent, she was dangerously attacked with typhoid fever, and at her request was attended by the plaintiff, as her physician, from day to day, for a period of twenty-one days, which services were rendered without the procurement, knowledge, or consent of the defendant. These circumstances are widely different from those in *Everett* v. *Sherfey*. Here there was no disagreement that resulted in the daughter leaving home; no want or waiver of parental authority; no dissatisfied and roving disposition; no statement by the father that he had no control over his daughter, and no publication by the father notifying persons not to credit her on his account. The circumstances disclosed in this case are such as are of frequent occurrence in this country. Parents,

either from necessity or from a desire to teach their children to be industrious and self-supporting, emancipate them from service, for a definite or indefinite time, without any intention of thereby releasing their right to exercise care, custody, and control over the child. The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy, sickness, or accident—who, most of all others, need support—would not be entitled to it. Blackstone, in his Commentaries (volume 1, p. 446), says:

> The duty of parents to provide for the maintenance of their children is a principle of natural law—an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents.

This obligation to support is not grounded on the duty of the child to serve, but rather upon the inability of the child to care for itself. It is not only a duty to the child, but to the public. The duties extend only to the furnishing of necessaries. What are necessaries must be determined by the facts in each case. The law has fixed the age of majority; and it is until that age is attained that the law presumes the child incapable of taking care of itself, and has conferred upon the parent the right to care, custody, control, and services, with the duty to support.

3. There being no direct evidence as to the purposes of the defendant with respect to his daughter, we are to say with what intention he consented to his daughter's going and remaining away from his home as she did. That he intended she should control her own earnings, at least until such time as he should declare otherwise, is evident; but that it was ever his intention that if by sickness or accident, she should be rendered unable to support herself, he would not be responsible to those who might minister to her actual necessities, we do not believe. Such an inference from these

facts would be a discredit to any father. In our view there was, at most, but a partial emancipation—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control, and support. There was no such an emancipation as exempted the father from liability for actual necessaries furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease, or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessaries furnished to her. As already stated, what are necessaries must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently necessary for the support and well-being of the defendant's daughter. As we have seen, he had not relieved himself from the duty to furnish her support, and, from his obligation to do so, may be presumed to have promised payment to any one who did furnish it in his absence.

Our conclusion is that the judgment of the District Court should be affirmed.

BECK, J., (*dissenting.*) 1. I cannot assent to the doctrines and conclusions announced in the majority opinion in this case. The facts are presented in the certificate of the Judge upon which the case is brought here on appeal. We cannot look elsewhere for the facts. They are, briefly stated, these: The daughter was seventeen years old, and, with the father's consent, was at service thirty miles away from his home, and had been for three years, all the time controlling her own wages, and supplying her own wants, and receiving nothing for support or necessaries from her father. The father had no knowledge that services were rendered to the daughter by plaintiff, or that his daughter was sick. It is not shown that

the daughter was a pauper, or without means to pay the plaintiff. No presumption to that effect will be entertained.

2. These facts show that the daughter was emancipated by the father. Emancipation may be shown by circumstances from which may be inferred the consent of the father that the child may control his own time, earnings, and actions. Slight circumstances tending to show such consent are sufficient, in the absence of contradictory evidence: Schouler, Dom. Rel. § 267; *Everett* v. *Sherfey* (1855), 1 Iowa 356.

3. Emancipation relieves the child of subjection to the parent, and bestows upon him the capacity of managing his own affairs as if he were of age, (*Everett* v. *Sherfey*, *supra*; Schouler, Dom. Rel. § 268;) and it also relieves the parent of all legal obligation to support the child, (Id. § 268.)

4. A parent is bound neither at common law, nor by any statute of the State, to support his children who are of age: *Monroe Co.* v. *Teller* (1879), 51 Iowa 670; *Blachley* v. *Laba* (1884), 63 Id. 22. As I have shown, an emancipated child stands as to his obligation to his parent and the points exempt to or from obligation for his support, just as a child who is of age.

5. It may be that the parent would be under obligation to support a pauper child who is of full age, or that a promise would be inferred on the part of the father to render such support. But that point is not in this case, as it is not claimed that the child for whose support the father was sued is a pauper, or not possessed of ample means to pay plaintiff for the services rendered by him.

6. Doctrines as to the liability of the father for the support of his minor child, and his liability therefor upon a promise, express or implied, and upon other points of the law, are found in the majority opinion, to which I dissent. As tending to support my views, I cite the following decisions of this Court: *Dawson* v. *Dawson* (1861), 12 Iowa 512; *Johnson* v. *Barnes* (1886), 69 Id. 641. See to the same effect, Schouler, Dom. Rel. § 236. In my opinion, the judgment of the District Court ought to be reversed.

Judgment affirmed.

In perusing the principal case, two questions present themselves to the legal mind. *First*, Is the obligation of a father to support and maintain his infant child, a mere moral obligation, and therefore not enforceable in the absence of an express promise, or is it a duty imposed upon him by the common law? And *Second*, Does the emancipation of a child by the parent absolve him from the duty?

Upon the first of these questions there is very great conflict of opinion in the courts of this country, except, perhaps, in cases where the duty is imposed by statute. This latter imposition, however, it is not intended to treat upon in this annotation, which will, as far as possible, be confined within the limits suggested by the questions presented above, and for this reason: that the statutes apply not only to minor, but to adult children.

"The duties of parents to their children, as being their natural guardians," says KENT, "consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation": 2 Comm. *189. And "The duties that are enjoined upon children to their parents, are obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives": Id. *207. Moreover, the father, unless guilty of some act which will empower the courts to decree otherwise, is entitled to the custody of his child until it attains the age of twenty-one years, which is fixed in this country as the age of majority and discretion, after which the child becomes a free agent.

From the above, the question would present itself, Are these duties reciprocal, are they dependent the one upon the other? Is it maintenance and education in consideration of obedience and assistance? Cases are not wanting in which the duty of the father to maintain his child during minority is placed upon the ground that he is entitled to the services of such child, the one being compensatory of the other, the right to services going hand in hand with the obligation to support: *Morse* v. *Welton*, (*infra*, page 33); *Farrell* v. *Farrell*, (33); *Husband* v. *Husband*, (37); *Everett* v. *Sherfey*, (38); *Hollingsworth* v. *Swedenborg et al.*, (36); *Sawyer* v. *Sauer*, (39); *Gilley* v. *Gilley*, (40); *Addison* v. *Bowie*, (41); *Greenwood* v. *Greenwood*, (41); *Nightingale* v. *Withington*, (41); *Clemens* v. *Brillhart*, (44); *In the matter of Ryder*, (48); *Furman* v. *Van Sise*, (49); *Trustees of Jefferson Township &c.* v. *The Trustees of Letart Township*, (49).

Although the question viewed in the light of reciprocity is supported by the above opinions, the same author (KENT) states the law to be that "the parent is absolutely bound to provide reasonably for his maintenance and education, and he may be sued for necessaries furnished, and schooling given to a child, under just and reasonable circumstances. The father is bound to support his minor children, if he be of ability, even though they have property of their own," and cites *Stanton* v. *Willson*, *infra*, page 33, and *Van Valkinburgh* v. *Watson*, (48), in support of his theory: 2 Comm. *191. This statement of the law is taken objection

to, and severely criticised, by Justice REDFIELD, in *Gordon* v. *Potter* (1845), 17 Vt. 248, who considers it unsupported by the authorities quoted. (*Infra*, page 52.) In *Stanton* v. *Willson*, the citation of which in support of the Chancellor's statement is taken objection to, the Court did say that "parents are bound by law to maintain, protect, and educate their legitimate children, during their minority or nonage," while in *Van Valkinburgh* v. *Watson* the Court did not express the theory in such clear language. Be this difference of opinion, however, as it may, there are numerous authorities that uphold and endorse the learned Commentator's statement. This will be found in *Alston* v. *Alston*, *infra*, page 31, *Fuller* v. *Fuller*, (34); *Hines* v. *Mullins*, (34); *Dawson* v. *Dawson*, (38); *Johnson* v. *Barnes*, (38); *Tanner* v. *Skinner*, (39); *Addison* v. *Bowie*, (41); *Kinsey* v. *The State ex rel. Shirk et al.*, (37); *Willis* v. *Jones*, (41); *Reynolds* v. *Sweetser*, (42); *Dennis* v. *Clark*, (42); *Gleason* v. *City of Boston*, (42); *Brow* v. *Brightman*, (42); *Courtwright* v. *Courtwright*, (42); *The Matter of Besonby*, (43), where the law was applied to a stepfather; *McShan* v. *McShan*, *infra*, page 44; *Edwards* v. *Davis*, (48); *Walker* v. *Crowder*, (49); *Maguinay* v. *Sandck* (51); *Norton* v. *Ailor*, (51); *Evans* v. *Pearce*, *Griffith et al.* v. *Bird et als.*, (54); *McGoon* v. *Irvin*, (54). And many of these cases, along with others, support this as the law, even when the child has an estate of its own, provided the father is of ability.

So strongly has the question been viewed in some of the Courts, as being a legal obligation, that they have considered it as analagous to the obligation of a husband to support his wife. This responsibility of the husband is placed upon the ground of agency. Such being the case as between husband and wife, the question may be asked, Why, and upon what principle, should the one case differ from the other? Why should the law say a man must support his wife, and not support his minor child? Surely the one claim is as much a legal one as the other. Yet it is said a man must support his wife, but his own offspring he is under no legal obligation to support. Why should not a child be the agent of its father for the purchase of such articles as are absolutely necessary for its well-being and subsistence? A wife can only bind her husband for such, and surely the obligation of the father to the child ought to be the same. The theory is supported by the *New York* case of *Cromwell* v. *Benjamin* (*infra*, page 49); by the *New Hampshire* case of *Hillsborough* v. *Deering*, (45), and it would seem, by the language of Justice METCALF in the *Massachusetts* case of *Dennis* v. *Clark*, (42), and by that of Justice MCKINNEY in the *Tennessee* case of *Maguinay* v. *Sandck*, (51). It is, however, taken objection to by Justice REDFIELD, in the *Vermont* case of *Gordon* v. *Potter*, (52), who says, "there are substantial reasons why it should be" different, and a distinction is taken by Justice WILSON in the *Illinois* case of *Hunt* v. *Thompson* (35), who recognizes the claim of the wife as one of common law, while that of the child is only one of natural law, "left to the natural and unextinguishable affection which Providence has implanted in the breast of every parent."

Cases are not wanting, however, which show that where there is an omission of parental duty, the father is liable for necessaries furnished to the child residing under the parent's roof, and also where the child is forced to leave the same by the father's conduct.

Two cases may, however, here be noticed as illustrating to a high degree the great conflict of opinion upon this question. It will be observed that they are both cases where medical aid had been rendered to the child, who in each instance was residing with the father. In the *Missouri* case, the child was living with the father when taken sick, while in that of *Vermont*, the child was emancipated, and being taken sick returned home, in both, it would seem, the child called in his own physician. In the former case, *Rogers* v. *Turner* (1875), 59 Mo. 116, although the Court admitted that medical services might be necessaries, it held the father was not under any obligation to pay for services rendered without his knowledge or assent; while in the latter, *Swain* v. *Tyler* (1853), 26 Vt. 9, the Court held the father liable. It also appeared that in the latter case the father had published a notice of an express agreement made between himself and his son upon the latter's emancipation, to the effect that he would not be responsible for the debts of his son.

If the rights and duties of the parties are, as have been pointed out, reciprocal and dependent the one upon the other, it would seem that the release of such duties on the one side ought to work a relaxation of those on the other. Yet it has been held that even though a child may be emancipated, the father's duty to watch over and discipline the child still remains, and further that such emancipation may really be for the purpose of discipline, to teach the child to be industrious and thrifty, in order that it may the better prepare itself for success in the world. To this effect is the language of Justice CLARK in *Beaver* v. *Barr* (1883), 103 Pa. 58, "the exercise of parental authority is not necessary for the profit of the parent, but for the advantage of the child, the duty of service by the child being deemed necessary to the proper exercise of parental authority, for its own good. Although we still recognize the right of the father to the personal services of his children the right is simply incidental to the duty of the father to discipline and direct them, his right to personal custody and personal service are secure to him, therefore, in order that through them, prompted by natural affection, he may successfully impart to them habits of industry, methods of thrift and the means of personal success in life. * * The right to their services being merely for their good, whenever the father finds their interest or his own better subserved by their emancipation, he can liberate them. This emancipation may be as perfect when they live together, under the same roof, as if they were separated; for although the father thus relinquishes his right to their services, as a means of discipline, the duty of discipline still remains, and this duty can be better exercised in the family than elsewhere."

It has been truly said that "a child is not like a horse or any other chattel," which may be made the subject of absolute gift; a

father cannot relieve himself of his responsibilty by giving away his child, except by decree of a court of competent authority, neither can he be deprived of his right to its custody: *Chapsky* v. *Wood et al.* (1881), 26 Kan. 650.

The cases may be said to be unanimous in holding that in order to render a father liable to a stranger for necessaries furnished to his infant child, there must be either an express promise or the circumstances must be such as imply such promise in law, but they are not unanimous in holding that such promise will be implied from the obligation to support, neither are they unanimous upon the question of the father's liability after an emancipation of the child, or after a decree *a vinculo*, or a mutual agreement between the father and mother to live separate and apart.

In *Alabama*, the early case of *Owen* v. *White* (1837), 6 Porter (Ala.) 435, where articles had been furnished by the plaintiff to the minor son of the defendant, rules that "A father is not bound by the contract of his son, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one. So long as the child continues under the direction and control of the father, it is left to the discretion of the parent to determine what is necessary for him, unless it appear that there is a clear omission of parental duty in providing for his maintenance. Where this is the case, the law subjects the father to the payment for necessaries furnished by a third person, upon the ground that his neglect to do that which natural, moral and municipal law have prescribed as a duty, implies an authority to bind the parent. If a child leave his father's house to seek his fortune in the world, or avoid domestic discipline and restraint, or escape from justice, the authority of the father to purchase necessaries, is not implied. But if a father abandon his duty to his infant child, so that he is forced to leave his house, he is liable for a suitable maintenance. And the principle of distinction is, that in the one case, the father is blameless, and in the other, blameable." In the more recent case of *Alston* v. *Alston* (1859), 34 Ala. 15, wherein the plaintiff sought a settlement and account of his father's guardianship, the Court says, "It is a general rule of law, that the father is bound to support his minor children, if able to do so, even though they have property of their own," following the rule laid down by Chancellor KENT, and by the previous cases of *Pharis* v. *Leachman* (1852), 20 Ala. 685, and *Bethea* v. *McCall* (1843), 5 Id. 308, and subsequently approved in *Beasley & Wife* v. *Watson* (1867), 41 Id. 234.

In *Stovall* v. *Johnson* (1849), 17 Ala. 14, it was held that "a father is bound to support his minor children, and is entitled to their services, * * * [but] is under no positive obligation to advance or even educate his children."

In *Arkansas*, the father, it would seem, is liable for their support, for in *Holt* v. *Holt* (1883), 42 Ark. 495, the Court held that "The dissolution of the marriage tie, and decreeing the custody of the children, either permanently or temporarily to the mother, do not relieve the father of his obligation to support them. If they are too young to earn their own livelihood, the father must continue to furnish

them a maintenance out of his estate, regard being had to his means and condition in life." In this case there had been a decree *a vinculo*, by which the custody of the children, until six years of age, was given to the mother, without provision for their maintenance, for which she sued the father.

In the more recent case of *Jordan* v. *Wright* (1885), 45 Ark. 237, where suit was brought to recover money expended by the plaintiff in rearing and maintaining defendant's infant daughter, Chief Justice COCKRILL declares that "The duty of parents to provide for their children is, says Blackstone, a principle of natural law. While there is conflict in the authorities in determining when this moral obligation becomes a legal one, all are agreed that the moral obligation of the parent to perform this duty is a sufficient consideration to sustain a promise to pay another to relieve him of the burden. Circumstances from which a promise may be inferred will raise the presumption of an implied contract in this as in other classes of cases. Indeed, so zealous are the courts to enforce this obligation, that slight evidence has sometimes been held sufficient to warrant the inference that the parent has contracted to pay for the maintenance of, or necessaries furnished, his infant child."

In *California*, the Civil Code provides, "SEC. 196. The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability. SEC. 203. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the supervisors of the county where the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced. SEC. 206. It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished is binding. SEC. 207. If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances a third person may in good faith supply such necessaries, and recover the reasonable value thereof from the parent. SEC. 208. A parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause."

The duty of a parent, or one standing *in loco parentis*, to support and maintain his minor children is further illustrated by the case of *Starkey* v. *Perry* (1886), 71 Cal. 495, where the plaintiff, the uncle of the defendant, as administrator of her mother's estate, had received certain moneys as her portion of the estate, and claimed to have expended on behalf of the defendant for necessary clothing, board and lodging, a sum in excess of such receipt, which sum the defendant refused to pay. While acting in that capacity, the plaintiff took the defendant to live in his

own home, as a member of his family, she being then a minor. Here the Court held that "when the defendant became a member of the family of her uncle, at his request, the uncle stood towards her *in loco parentis*, and in that relation he was bound in law to support and maintain her according to circumstances. Her support and maintenance included necessaries of food, clothes, and lodging, for which he could not charge her, as a member of his family, any more than he could charge for such things, one of his own children."

In the very early case of *Stanton* v. *Willson* (1808), 3 Day (Conn.) 37, where there had been a decree of divorce *a vinculo*, the mother having the custody of the children, and becoming their guardian, the Court said, "Parents are bound by law to maintain, protect, and educate their legitimate children, during their infancy, or nonage. This duty rests on the father; and it is reasonable it should be so, as the personal estate of the wife, and in her possession at the time of the marriage, becomes the property of the husband, and instantly vests in him. By the divorce, the relation of husband and wife was destroyed; but not the relation between Bird [the father] and his children. His duty and liability, as to them, remained the same, except in so far forth as he was incapacitated, or discharged, by the terms of the decree. * * It may be generally true, that minors under the government of parents cannot bind their parents for necessaries without their consent. The danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by the artful and designing, furnishes a sufficient reason for the rule; but neither the rule, nor the reasoning, will apply to the charges in respect to two of the children in this case. The articles were furnished by the guardian herself, or at her request; who, in virtue of her trust, had full power to contract, and make the father liable for necessaries, not only without, but against his consent."

The more recent case of *Morse* v. *Welton* (1827), 6 Conn. 547, although actually deciding another question, supports the rule, that the father is bound to maintain, protect and educate his child, upon the ground that he is entitled to the services of his minor child.

In *Farrell* v. *Farrell* (1868), 3 Houst. (Del.) 633, the precise question was not before the Court, the action being on *assumpsit* by the son against the father for money had and received to and for the son's use while he was a minor, such money having been earned by the son by his own industry while living apart from his father, and was sent by him to his father to hold and invest for him as he directed. In delivering the opinion, Chief Justice GILPIN remarked, "Whilst it is the duty of a father to nourish, support and maintain his minor child, it is equally the duty of such child to obey and serve his father, in all that may be reasonably required of him. These duties are reciprocally binding upon the parties; support and maintenance on the one hand and obedience and service on the other, the one being dependent upon, and compensatory of the other. And although the general principle is clear and unquestioned, that the

father is entitled to the services of his minor child, and to all that such child earns by his labor, yet, it seems to be equally clear, that, as the right of the father to the services of his child is founded upon his duty to support and maintain his child, if he should fail, neglect, or refuse to observe and perform this duty, his right to the services of his child should cease to exist. And such we hold to be the law. I speak here of the civil rights and duties or obligations which belong to the relation of parent and child. Human laws deal with these alone. There are undoubtedly, other and higher duties of a moral and religious nature growing out of this relation, which are beyond the cognizance of any human tribunal."

In the *District of Columbia*, the case of *Holtzman* v. *Castleman et als.* (1876), 2 McArth. (D. C.) 555, was a suit in equity brought by the plaintiff against her father, the defendant, as administrator and natural guardian, for an account of the rents and profits, and a decree of her share, the defendant claiming to have expended the money in her support, and that of the other children. The Court said, "A father is in duty bound to support and maintain his children. This is a duty relative to circumstances. He is also entitled to their services. He is only bound to keep them from want for the actual necessaries of life." The facts showing that the father had expended the estate in giving the children a good education beyond that which his own means permitted, he was allowed such expenditure in the account.

In *Florida*, *Fuller* v. *Fuller* (1887), 23 Fla. 236, was a suit brought against the appellant by his child, through her next friend, for an accounting for the property of her mother (the late wife of the appellant) and the income and profits thereof. The bill alleged that the appellant was amply able to provide from his own resources for the education and maintenance of appellee in a suitable manner; this was denied, and the appellant claimed an amount therefor to be allowed out of the estate. The Court said, "It is the duty of a father, if he can, to maintain and educate his child during the latter's minority, even though the child have an estate," but in this case the father's estate being alone sufficient for his own support, he was allowed to charge his daughter's income with her own support.

In *Georgia*, *Hines* v. *Mullins* (1858), 25 Ga. 696, was an action brought against the father on his bond as guardian, to pay over the estate in his hands to the plaintiff, the father claiming a deduction for his children's maintenance. The Court laid down the rule that "A father is bound to support and educate his children if he is able to do so, and that, whether they have property of their own or not." The father being at the time well able to support his children was not allowed to make the deduction claimed. The same learned Judge who delivered the opinion of the Court in the above case, BENNING, J., subsequently in *Brown & McCoy* v. *Deloach* (1859), 28 Ga. 486, where suit was brought against the father for articles supplied to his infant son, adds, "Even if a father is bound to furnish his child with necessaries, and fails to do so, that does not impose an obligation on any third person to discharge this

duty of the father. If a third person does it, then he does it voluntarily, and what right have voluntary services to expect more than voluntary compensation." Here, however, it was shown that the goods were not necessaries, and the plaintiff failed to show that the father had not supplied his child with a proper supply of such articles as those furnished. The Court citing numerous English cases, and approving of the doctrine therein established, to the effect that a father is not bound to pay for necessaries furnished to his minor son without his authority, held the father not liable.

In *Illinois*, in *Hunt* v. *Thompson* (1841), 3 Scam. (Ill.) 179, a minor son went, with the approbation of his father, upon a visit to some friends, and at the time was suitably provided with apparel, but his stay being a long one, he became in need of new clothes, which the plaintiff made for him, and brought action for the price. It appeared, however, that the son did not live with his friends, but boarded at a tavern, and contracted this and other debts, which his friends considering extravagant, informed his father of, who immediately gave notice by letters that he would pay none of his son's debts, but it did not appear that the plaintiff knew thereof. Here Chief Justice WILSON, in holding the father not liable for the goods, says "That a parent is under an obligation to provide for the maintenance of his infant children, is a principle of natural law; and it is upon this natural obligation alone, that the duty of a parent to provide his infant children with the necessaries of life rests; for there is no rule of municipal law enforcing this duty. The claim of the wife upon the husband, for necessaries suitable to his rank and fortune, is recognized by the principles of the common law, and by statute. A like claim, to some extent, may be enforced in favor of indigent and infirm parents, and other relatives against children, &c., in many cases; but, as a general rule, the obligation of a parent to provide for his offspring, is left to the natural and inextinguishable affection which Providence has implanted in the breast of every parent. This natural obligation, however, is not only a sufficient consideration for an express promise by a father to pay for necessaries furnished his child, but, when taken in connection with various circumstances, has been held to be sufficient to raise an implied promise to that effect. But either an express promise or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the parent for necessaries furnished his infant child by a third person. * * It is the act of the parent, and not those of the infant, that are to be looked to as affording a presumption of authority that will render him liable."

The case of *McMillen* v. *Lee* (1875), 78 Ill. 443, was an action brought to recover for medical services rendered to a child of the defendant, who along with the mother, was living separate and apart from the defendant, the father. It was not disputed that the services were necessary, but the question was, whether, under the circumstances, the father was liable, the services not having been rendered upon his employment, and he had not made any express promise to pay for them. The facts

of the case are important, the evidence showing that the mother was living with a third person as housekeeper, under an agreement to pay her weekly wages and keep the child as part of his family, and that this party called in the plaintiff. There would appear to have been two separations between the husband and wife, the first being made on account of the child, the wife saying it was not the defendant's child, and that she would take it and keep it; subsequently they lived together again, but again parted, the separation being by mutual consent. Upon these facts Justice SHELDON considered "the principle as laid down in 1 Parsons on Contracts, 307, would apply here: that, where the father and mother separate, and the father permits the mother to take the child with her, then the father constitutes the mother his agent to provide for his child, and is bound by her contract for necessaries for them." With respect to the general rule of law applicable to this question, the defendant objected to the instruction given in the Court below, to the effect that the law does not require an express promise by a father to pay for medical services rendered to his child, but that if necessary, or rendered under circumstances which raise an implied promise, the law will imply a promise; on appeal, the learned Judge remarked, "We recognize the law to be * * that either an express promise, or circumstances from which a promise by the father can be inferred, are necessary, in all cases, to bind the parent for necessaries furnished his infant child by a third person." The Court held that there was an implied promise, and affirmed the judgment of the Court below, which was for the plaintiff.

In *Indiana*, in *Hollingsworth* v. *Swedenborg et ux.* (1875), 49 Ind. 378, the action was brought to recover for work done for the defendant by the plaintiff's minor daughter, and the judgment was rendered for the plaintiff. In reversing the judgment, no express contract being shown, and the daughter living away from home, Justice DOWNEY states that "Independent of statutory enactment, there is no legal obligation on a parent to maintain his child. The common law considered the performance of the moral obligation and duty as better secured by the impulses of our nature, than by legal enactment. The duty is one of imperfect obligation, that is, a duty for the enforcement of which the law provides no remedy. * * Hence we think the statement of the rule, with reference to the right of the father to the services of his minor child, making it dependent upon the condition that the child is maintained by the father, must be correct. For if the father does not maintain the child and is under no obligation enforceable by law to do so, the child must, of necessity, be entitled to its own earnings, or have no means of subsistence." He relies upon *Farrell* v. *Farrell*, *supra*, page 33, and quotes the language of Chief Justice GILPIN.

In *Wallace* v. *Ellis* (1873), 42 Ind. 582, the wife left her husband without cause, taking the two children with her, and went to reside with the plaintiff, her brother-in-law, who sued for the board of the wife and children. It appeared, however, that the father was able, ready and willing to support his

minor children at his own home, and therefore the plaintiff, who had supplied them with board without the father's consent, could not recover, the facts not showing that the husband in living separate from his wife, had allowed the children to reside with her, consequently there was no implied contract constituting her his agent for necessaries for the children on his credit.

The more recent case of *White et al.* v. *Mann* (1886), 110 Ind. 74, where the action was against the father to recover for goods supplied to his daughter, establishes and supports the principle that a father is not bound by the contracts or debts of his son or daughter, even for necessaries, as a rule, unless circumstances show an authority actually given or to be legally inferred. Consequently the action failed.

In *Husband* v. *Husband* (1879), 67 Ind. 583, the question before the Court was, "Does the law imply an obligation on the part of the father to pay his former wife for her support and maintenance of the minor child or children of the marriage, where she has obtained a divorce from him, and has, in the decree, been awarded the custody of such child or children?" And in answer the Court said, "This question must, we think, be answered in the negative. The right of the parent to the services of the child, and the obligation of maintenance devolving upon the parent, have been said to be reciprocal rights and obligations." Continuing, WORDEN, J., says, "And, if the principle above announced be correct, neither the former wife nor anyone else could maintain an action against the father, for the support and maintenance of the child, while he was deprived of her custody and services, on any obligation arising out of duty."

In *Kinsey et al.* v. *The State ex rel. Shirk et al.* (1884), 98 Ind. 351, the question was, whether the guardian and father of an infant child could assert and maintain a legal claim against the estate of his ward for taking care of and supporting her during the first five years of her life, or for expenses incurred by him on that account? And was answered by the Court in the negative in these words: "When the father and guardian, as in this case, has the means and ability to care for and support his child during the tender years of infancy, it is his duty to do so, and he will not, for the care and support thus given, be allowed to claim against his ward's estate."

In *Iowa*, in *Hunt* v. *Hunt* (1854), 4 G. Green (Ia.) 216, there had been a decree in divorce whereby the husband had the right to the custody of the minor child, then held by its mother, from whom he, in this action, claimed its care and custody. In granting him the relief sought the Court said, "The father has legal power over the child until it arrives at the age of twenty-one years. There can be no doubt of the paramount right of the father to the possession, care and control of his minor child. But the right of the father to have its society, filial affection and services, as well as to see to its health, education, &c., are not the only matters for consideration here. When he is not under some disability, legal or otherwise, the law holds him responsible to the child, and in accordance with the principles of nature and sound moral-

ity, makes him answerable for the preservation of its health and support. He is also under legal obligation to the community in which he resides, to maintain and support the child."

In *Everett* v. *Sherfey* (1855), 1 Iowa 356, much relied on in the principal case, the facts of which sufficiently appear therein, *supra*, page 23, the Court (WRIGHT, C. J.) said, "As it is the duty of the father, to educate, protect and nurture his children, so it is his right to have their society, their services, and the control of their moral and intellectual training. These rights and duties are correlative. * * At common law, the father had a right to sue for, and recover the money due for, the minor's services. He was entitled to it, the same as that due for his own services. * * By emancipation * * we understand, such act of the father, as sets the son free from his subjection, and gives him the capacity of managing his own affairs, as if he was of age. * * In the absence of statute, the rule that now obtains is, that such emancipation need not be evidenced by any formal, or record act of manumission, but is a question of fact, which may be proved by direct proof, or from circumstances."

In *Dawson* v. *Dawson* (1861), 12 Iowa 512, an action to recover compensation for the support of the defendant's father, who was also the uncle of the plaintiff, the Court, in holding the defendant not liable at common law, said, "The duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common law duty." This view of the law is taken in the more recent case of *Johnson* v. *Barnes* (1886), 69 Iowa 641, where the Court said, "In favor of a third person who supports a child, a promise to pay may, and should, be inferred, on the ground of the legal duty imposed." In this case the action was by the wife against the husband, after a decree in divorce, for the support of the child, but the Court held she could not recover, as the case was governed by Section 2214 of the Code of that State.

The point was raised in *Kansas*, in *Harris* v. *Harris* (1869), 5 Kan. 46, when there had been a decree *a vinculo* between the husband and wife, which gave the wife the custody, &c., of the children. After the decree, another child was born, and the wife brought suit against the father to recover money expended by her in supporting all the children. Here Chief Justice KINGMAN, in refusing her demand, remarks, "Our statutes, so far as we are aware, leave this obligation of the father, as at common law, a natural obligation to support, protect and educate the child he has brought into existence, with a power in the appropriate tribunal to enforce the obligation as between the father and the community. But this obligation rests equally with the mother, and this whether it be regarded as a legal or natural duty; originally it was a purely natural obligation, resting upon both parents alike. * * * With this obligation on the part of the parents arise accompanying rights, and among these is that of the parent to the society, comfort, obedience and services of the child. Can a stranger take these from a parent, and then compel him, by suit at law, to reimburse him for what he may deem fitting care and

education of his child? This would not be just, neither is it law. * * We are aware that in many cases * * courts have declared that a father is bound to support his minor children, if he be of ability to do so, but in most which we have had an opportunity to examine, the question raised in this case was not before the court, and the general declaration of such a principle, without limitation or qualification, sufficiently shows that the attention of the court had not been given to the question. No one supposes that a father, poor and infirm, is bound to support a healthy, robust son, of eighteen, though he be a minor, except as he has a right to his services, and of control over his actions; or that any father is dependent upon the changing fashions and varying tastes of the hour in determining what is best for his child; nor does anyone suppose it more the duty of the father than of the mother to support the children; both are alike entitled to love, society, obedience and services of their offspring; they are alike interested in their welfare, and in deciding what is best calculated to promote it with reference to their ability and means, and also to their other duties to themselves and to others. It is true, that while the coverture exists, the legal responsibility, so far as strangers are concerned, may rest exclusively on the father, but as between themselves and the children, the duty is as much that of the mother as the father." In the more recent case of *Sawyer* v. *Sauer* (1873), 10 Kan. 519, Justice BREWER, in disallowing the action by the father to recover for loss of the services of his minor son, recognized the theory that "The father is under obligations to support his minor children, and entitled to receive the benefits of their services. * * The right to services goes hand in hand with the obligation to support. The father's right to services extends to the period of majority. He may alienate or relinquish it for a while and afterwards assume it." And still more recently in *Chapsky* v. *Wood et al.* (1881), 26 Kan. 650, where suit was brought by the father for the custody of his minor child, the same learned Judge in decreeing against the father, remarks, "The father is the natural guardian, and is *prima facie* entitled to the custody of his minor child. The right springs from two sources: one is, that he who brings a child, a helpless being, into life, ought to take care of that child until it is able to take care of itself; and because of this obligation to take care and support this helpless being arises a reciprocal right to the custody and care of the offspring whom he must support; and the other reason is, that it is a law of nature that the affection which springs from such a relation as that is stronger and more potent than any which springs from any other human relation. * * A child is not in any sense like a horse or any other chattel, subject matter for absolute and irrevocable gift or contract. The father cannot, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody."

In *Kentucky*, it would seem to be held the legal duty of a father to support his infant children, for in *Tanner* v. *Skinner* (1874), 11 Bush. (Ky.) 120, the Court said,

"It is the natural and legal duty of a father to support his children, and it is only under peculiar circumstances that he will be allowed to charge them for maintenance and education." This was an action upon a guardian bond, in which the sureties answered that the father was a poor man, worth less than any of his children, and should be paid for rearing them. The Court below adjudged the sureties not liable for the amount claimed, but this judgment was reversed on appeal.

The question now under consideration would seem in *Louisiana*, to be governed by the Civil Code of that State, for it is provided by "ART. 227. Fathers and mothers by the very act of marriage, contract together the obligation of supporting, maintaining, and educating their children." In *St. Louis University* v. *Prudhomme & Wife* (1869), 21 La. Ann. 525, the suit was brought against the wife, the husband being a nominal plaintiff, after a decree in divorce, to recover for board, tuition, and expenses of the minor son of the marriage. In decreeing the wife not liable, the debt having been contracted before the divorce, the Court remarked, "The very act of marriage also superinduces between the parties the community of acquets and gains, unless it should be otherwise stipulated by a matrimonial contract. This obligation upon both the spouses to defray the expenses of maintaining, supporting and educating their common offspring necessarily subsists during the continuance of the community, although the husband, being the head and master of that community, is preeminently liable for all its debts." To the same effect *Michie et al.* v. *Arneat et al.* (1860), 15 La. Ann. 225.

In *Maine*, *Gilley* v. *Gilley* (1887), 79 Me. 292, was an action brought by the mother against the father for the support of the younger children after a decree *a vinculo* on the ground of the father's desertion and failure to support. Here Justice VIRGIN, in affirming the judgment of the Court below, which held the father liable, states the law as follows: "It is matter of common knowledge that a father is entitled by law to the services and earnings of his minor children. It is equally well known that this right is founded upon the obligation which the law imposes upon him to nurture, support and educate them during infancy and early youth, and it continues until their maturity, when the law determines they are capable of providing for themselves. * * A minor, who voluntarily abandons his father's house, without any fault of the latter, carries with him no credit on his father's account even for necessaries. Otherwise a child impatient of parental control while in his minority, would be encouraged to resist the reasonable control of his father and afford the latter little means to secure his own legal rights beyond the exercise of physical restraint. * * * We are aware that courts of the highest respectability, especially those of New Hampshire and Vermont, hold that a parent is under no legal obligation, independent of statutory provision, to maintain his minor child, and that in the absence of any contract on the part of the father, he cannot be held except under the pauper laws of those States which are substantially like our own. But * * the law

was settled otherwise in this State before the separation and has been frequently recognized in both States since, and we deem it the more consistent and humane doctrine. When the divorce was decreed in behalf of the wife the defendant ceased to be her husband, but he still remained the father of the children * * with all the father's duties and legal obligations full upon him."

In *Weeks* v. *Merrow* (1855), 40 Me. 151, the action was against the father, to recover for the board of his minor son, who had left his father without his parent's consent or knowledge, and worked elsewhere. Justice RICE in ordering a nonsuit, lays down the law thus: "Where a child leaves his parent's house, voluntarily, for the purpose of seeking his fortune in the world, or to avoid the discipline and restraint so necessary for the due regulation of families, he carries with him no credit, and the parent is under no obligation to pay for his support. This doctrine is well sustained by authority, and though, at times, it may operate with apparent severity, is based upon sound principles. To permit a minor, at his election, to depart from his parent's house, with power to charge that parent with his support, would tend to the destruction of all parental authority, and invert the order of family government. If a minor is forced out into the world by the cruelty or improper conduct of the parent, and is in want of necessaries, such necessaries may be supplied, and the value thereof collected of the parent, on an implied contract."

In *Maryland*, the early case of *Addison* v. *Bowie* (1840), 2 Bland Ch. (Md.) 606, wherein the father was held liable to account, as the natural guardian of his children, for the profits of certain negroes held by him in trust for his children, and could make no deduction therefrom for their support, decided that "A father is bound to maintain his infant children, if able, and, therefore, nothing is ever allowed to him for that purpose out of the infant's peculiar estate, unless upon special grounds." And also that such support must be reasonable according to his means and circumstances. In the more recent case of *Greenwood* v. *Greenwood* (1867), 28 Md. 369, where the father successfully brought action for the seduction of his minor daughter, it is said, "The father is entitled to the custody of their persons and to the value of his children's labor during their minority, because during that period he is bound to maintain them." And further, "The common law has wisely limited the period during which the child is to be under the father's control, and is entitled to look to him for support, and it cannot be changed without some positive act of the Legislature to this especial end." And although the exact question did not arise in *Willis* v. *Jones et al.* (1881), 57 Md. 363, the opinion supports this theory.

In *Massachusetts*, Chief Justice PARKER holding the maker of a promissory note, made to an infant in payment of his services, liable to a subsequent holder, even after payment to the father of the infant, it not being shown that the father had prohibited payment to the son, in *Nightingale* v. *Withington* (1818), 15 Mass. 272, thus states the law: "Generally the father, in case of his death the mother, is en-

titled to the earnings of their minor children. This right must be founded upon the obligation of the parents to nurture and support their children; which obligation is compensated by a right to their services, or to the fruits of them, if by their permission they are employed by other persons. But where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle, but that of slavery, which will continue his right to receive the earnings of the child's labor. Thus if the father should refuse to support a son, should deny him a home, and force him to labor abroad for his own living; or should give him his time * * the law will imply an emancipation of the son; and although it will not allow him to contract to his prejudice, it will give him the benefit of such contracts as are made with him for his services."

In *Reynolds* v. *Sweetser* (1860), 15 Gray (Mass.) 78, the husband was sued for the board of his wife and six-year-old child. It appeared that the wife was compelled to leave her husband by cruel treatment, and took the child along with her. Justice MERRICK, holding the husband liable, says: "A father can never, under our law, (Rev. Stat. c. 46, § 5; c. 78, § 1) as long as he has pecuniary ability, be absolved from the obligation of relieving the necessities and contributing to the maintenance of his child." In *Dennis* v. *Clark* (1848), 2 Cush. (Mass.) 352, where a father was held entitled to recover an indemnity for money expended through injuries sustained by his infant child, Justice METCALF declared that "By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law and by the common law of England, to support and provide for his wife. * * * If a husband desert his wife, or wrongfully expel her from his house and make no provision for her support, a person who furnishes her with necessary supplies may compel the husband, by an action at law, to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children." And in the more recent case of *Gleason* v. *City of Boston* (1887), 144 Mass. 25, where action was successfully brought by the treasurer of the Commonwealth against the City, for money expended in the relief of a minor, Justice DEVENS said: "By the common law, as it exists in Massachusetts, the father is bound to support his minor children, and this even if he deserts them. * * The legal obligation which the father is under to support the minor child is usually assigned as the reason why he is entitled to recover its wages when it has profitable employment." To the same effect, *Brow* v. *Brightman* (1883), 136 Mass. 187.

From the *Michigan* case of *Courtwright* v. *Courtwright* (1879), 40 Mich. 633, it would seem that the duty is considered in that State to be "a legal obligation," and that "as against the public and the children," the father cannot "throw off the duty." In that case there was an agreement between the father and mother whereby the

father was held liable to pay the mother for money expended in the maintenance and support of some of the infant children. In *Tyler* v. *Arnold* (1882), 47 Mich. 564, the son, a minor, spent most of his time away, and was allowed to retain and spend most of the money he earned; the action was brought to recover for a suit of clothes. The defendant had never opened any account with the plaintiff, and had, in his own dealings with him, always paid in cash; he had never authorized his son to purchase on his credit, nor had he ever given the plaintiff to so understand. The Circuit Judge charged the jury that the parent was under a general moral and legal duty to provide necessaries for his infant child, and that in case of his failing in this duty willfully or negligently, a stranger might supply the necessaries at his expense. Chief Justice GRAVES, however, on appeal said that "the facts did not authorize the consequence which the charge permitted the jury to draw from it." The Court therefore did not discuss the question of parental responsibility.

Gotts v. *Clark* (1875), 34 Mich. 229, was a case of goods sold and delivered to the defendant's wife and minor daughter, and so far as those sold for the wife's use, judgment was given for plaintiff, but with regard to those sold to the daughter, the Court held he was not liable. In this case the goods bought by the daughter were of little value, and such as she needed, and without which she had not enough to make herself comfortable. She was, however, living away from his house, working for wages, and receiving the benefit of her own labor. In the opinion the Court say, "An express promise, or circumstances from which a promise may be inferred, must be proven before a father can be charged for goods sold and delivered to his minor child, by a third party."

In *Johnson* v. *Onsted* (1889), 74 Mich. 437, there had been a divorce *a vinculo* giving the wife the care, management and maintenance of the child of the marriage; the wife married again and along with her second husband, the plaintiff, took the child and cared for it as their own. Subsequently the plaintiff brought suit against the defendant, the father of the child, to recover for its care, support and maintenance. The Court found that the defendant was not liable, as "there was no contract, either express or implied, * * made by the defendant, under which he could be held liable," and further, that the wife could make none to bind him without his consent.

In *Minnesota*, in *The Matter of Besonby* (1884), 32 Minn. 385, the rule as laid down by KENT, *supra*, page 28, the Court said would apply to a stepfather who voluntarily assumes the parental relation, and receives the stepchildren into his family under circumstances such as to raise a presumption that he undertook to support them gratuitously. There does not seem to be any case expressly determining the question as between parent and child in this State, but from the above, it is presumed that the law as defined by the Chancellor governs thereiu.

In *Mississippi*, the father is responsible for the maintenance of his minor children, having a right to fix their domicile and control the household, with the duty im-

posed upon him to provide for and educate his children: *McShan* v. *McShan* (1879), 56 Miss. 413.

In *Missouri*, the case of *Girls' Industrial Home* v. *Fritchey* (1881), 10 Mo. App. 344, followed the view taken by KENT, *supra*, page 28, although it admitted there was very great conflict in the opinions. In this case the defendant was sued as the guardian of the widowed mother of an infant child, having moneys in hand to pay for its support and maintenance. The Court below gave judgment against the defendant, and was affirmed on appeal.

In *Rogers* v. *Turner* (1875), 59 Mo. 116, the action was brought to recover for medical services to the son. It appeared that the son was a minor living with his father, and consulted and employed plaintiff without the knowledge or consent of the father, who had a family physician. Neither the son nor the plaintiff advised the father of the fact until eighteen months after the services were rendered. The plaintiff's action failed, NAPTON, J., saying: "Medical services of [this] character might be considered as necessaries, but the father never having refused to supply the son with any medical attention that might be necessary, was under no obligation to pay for services rendered without his knowledge or consent."

In *Nebraska*, although *Clemens* v. *Brillhart* (1885), 17 Neb. 335, was not decided upon the question now under consideration, it being an action brought to foreclose a mortgage executed by a father to his son, to secure moneys owed by the father to the son, a third party intervening and alleging that the mortgage was fraudulent, yet the Court say, "While the law, in the absence of stipulations to the contrary, authorizes the parent to appropriate the earnings of his minor child, yet the right arises out of the obligation to support and educate the child." The Court below having given preference to an attachment issued by the intervenor, its judgment was modified so as to give the plaintiff a first lien on the mortgaged premises.

One of the earliest cases in *New Hampshire* is *Pidgin* v. *Cram* (1836), 8 N. H. 350, where there had been a mutual separation between the husband and wife, and subsequently a child born; the plaintiff sued the husband for the support of the wife and the child. There was an agreement between the husband and his wife's father that the latter should support his daughter: the Court held the defendant not liable as far as the goods supplied to the wife were concerned, and with regard to those furnished to the child, Chief Justice RICHARDSON, delivering the opinion of the Court, said: "There are cases in which a father may be liable for necessaries furnished to a child. As where he places his child in a situation to require necessaries, without providing the means of obtaining them. And in general, a parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglect that duty, any person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But in order to authorize any person to act for the parent in such a case there must be a clear and palpable omission of duty in

that respect on the part of the parent." It did not appear, so far as the child was concerned, that application to the father for assistance, had been made or refused. The child, a daughter fifteen years of age, might have been capable of furnishing herself with every necessary, by her own exertions, and therefore the Court exonerated the defendant from liability. In *Hillsborough* v. *Deering* (1827), 4 N. H. 86, suit was brought for the support of the defendant's pauper daughter and her infant child; the Court below being of opinion that the defendant was not shown to be of sufficient ability, gave judgment in his favor. This was, however, reversed on appeal, the Court saying: "It is very clear that the claim of unemancipated children to support from their parents stands on very different ground from the claim of any other description of persons to support from their kindred. By the common law, and independent of the statute, such children are entitled, and have a perfect right to support from their parents. * * As on the one hand he [the father] is entitled to their services until they arrive at the age of twenty-one years, so on the other hand he is by the common law bound to support them so long as he has any means whatever. They * * stand upon the same ground as his wife." *Litchfield* v. *Londonderry* (1859), 39 N. H. 247, to the same effect.

In *Kelley* v. *Davis* (1870), 49 N. H. 187, the action was brought to recover the price of necessaries sold to the defendant's minor son, who was seventeen years of age and at work at the time. The father had given the son his time, but it was not shown that plaintiff knew thereof. The Court below found the claim, subject to some reductions, a legal one. In a very lengthy and elaborate opinion, Justice FOSTER, after examining the previous cases in that State, and those of Vermont, New York, and Massachusetts, reversed this judgment, saying: "On the whole, the principles of law applicable to this class of cases seem to take the form of these propositions: that a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon a promise to pay for them; and that such promise is not to be implied from mere moral obligation, nor from the statutes providing for the reimbursement of towns; but the omission of duty from which a jury may find a promise by implication of law must be a legal duty, capable of enforcement by process of law." To the same effect, *Hammond* v. *Corbett* (1871), 50 N. H. 505; *Town of Farmington* v. *Jones* (1858), 36 Id. 271.

In *New Jersey*, *Freeman* v. *Robinson & Smalley* (1876), 38 N. J. Law. 383, was a judgment in the Court below for goods supplied to the defendant's son; this judgment was reversed on appeal, Justice DEPUE stating the law thus: "The duty of a father to provide maintenance for his children is a mere moral obligation. Except in cases within the statute of Elizabeth, and by the procedure there pointed out, he is not legally compellable to perform this duty. No action can be maintained against a father for goods purchased on his credit by his minor child, even though they be necessaries, unless the father has expressly or impliedly authorized the purchase on his credit. The authority of an infant to bind

the father by contract for necessaries may be inferred from slight evidence. But, nevertheless, where the parent gives no authority, and enters into no contract, he is no more liable to pay a debt contracted by his child even for necessaries, than a mere stranger would be. The mere moral obligation of a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him even for necessaries." The learned Judge goes on to show that in order to bind a father even for necessaries, it must appear that they are "proper to be provided for the maintenance having regard to the estate and social position of his father, or were indispensable to his life or bodily comfort. * * * The moral obligation of a parent to provide for his children must have some limit. It is not so far reaching in its operation as to impose a duty on the parent to provide everything which the taste or extravagance of the child may prompt him to desire, or tradesmen may see fit to provide. The obligation is limited to the furnishing of such articles as are necessary to the maintenance and support, leaving to the parent, in virtue of his parental authority, a discretion how far he may deem it prudent to exercise his generosity in the indulgence of his child."

In this case the charge to the jury in the Court below was intended to present the question whether a moral duty, independent of any legal obligation, is a sufficient consideration to give validity to a subsequent express promise by the father. After an examination of *Hawkes* v. *Saunders* (1775), 1 Cowp. 290, and *Wennall* v. *Adney* (1802), 3 B. & P. 247, Justice DEPUE remarks, upon the language of Lord MANSFIELD in the latter case: "The justice of this observation is apparent from the cases cited by the Chief Justice as illustrations of the application of the doctrine. He enumerates promises to pay debts, the recovery of which is barred by the Statute of Limitations; a promise by a man after he becomes of age to pay a just debt, contracted during minority, but not for necessaries; a promise by a bankrupt after his certificate, to pay his debts in full; and a promise to perform a secret trust, or a trust void for want of writing by the Statute of Frauds. In each of these instances, there was, originally, a consideration of benefit to the promisor, from which a promise would have been implied capable of legal enforcement, if some statutory provision or positive rule of law had not debarred the party from legal remedy." He then quotes the note to *Wennall* v. *Adney*, *supra*, and adds: "The principle thus enunciated was approved by Lord DENMAN in *Eastwood* v. *Kenyon* (1840), 11 A. & E. 438, and adopted by the judges of the Queen's Bench in *Beaumont* v. *Reeve* (1846), 8 Q. B. 486, and may now be considered as the settled law in the English courts. It has also been approved and made the basis of judicial decision quite generally by the courts in this country." And concludes by defining the law to be "that a mere moral obligation, or duty as an executed consideration, is not a sufficient consideration to support a subsequent express promise. If services be rendered, at the request of the promisor, which are for the benefit of a third party, towards whom the promisor owes only

moral duties, they may be recovered for. In such cases, the precedent request and services rendered in compliance therewith, afford a consideration from which a promise to pay would be implied, or such as is needed to uphold an express promise. But where the duty is one of moral obligation only, and the service is rendered without a previous request, a subsequent promise to pay is without the consideration which is necessary to the validity of a contract."

In a New Jersey case, *Tomkins* v. *Tomkins* (1858), 3 Stock. (N. J.) 512, the plaintiff sued for an account of the property of his deceased mother. The defendant had presented an account for the support of the plaintiff's children by the testatrix, obtained a judgment in attachment for the same, and sold the plaintiff's share thereunder. The plaintiff had abandoned his wife and child to the charity of the world, and the wife found shelter in the almshouse. The child was forced upon its grandmother, the testatrix, a woman then advanced in years, and of moderate means. There was no evidence that during the fifteen years the child was under its grandmother's care, the father ever made any inquiry as to its whereabouts or welfare. The Chancellor in view of these facts, remarked, "The law, as it has been adopted in this State, is as laid down by the Court in *Van Valkinburgh* v. *Watson* [*infra*]. A parent is bound to provide his infant children with necessaries; and if he neglect to do so, a third person may supply them, and charge the parent with the amount. But such third person must take notice of what is necessary for the infant, according to his situation in life; and where the infant lives with his parent, and is provided for by him, a person furnishing necessaries cannot charge the parent. 'When the infant is *sub potestate parentis*, there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for and charge the expenses to the parent.' * * If there was any doubt as to the *legal* obligation of the father to provide for his child, and of his legal liability to such as should supply that child with the necessaries of life, the moral obligation is so strong that a court of equity would feel but little inclined to grant relief, on any such ground as that the moral obligation had been converted into a legal one." The bill was dismissed, but solely upon the ground that the defendant had obtained a legal advantage.

In *McKnight's Executors* v. *Walsh* (1872), 23 N. J. Eq. 136, suit was brought for the settlement of the account of the testator's estate, the whole of the infant's share having been paid to its father, and applied by him in the support of himself and his children. The Court, in holding that all beyond what had been properly paid for the maintenance and education of the infant was paid by the trustee in his own wrong, said, "In general a father is bound to support his infant children, and is not entitled to have the income of their estate appropriated for their support without an order of some proper court based upon his inability to support them." To the same effect, *Stevens Adm'r* v. *Stevens Ex'r* (1873), 23 N. J. Eq. 296; *Tompkins* v. *Tompkins* (1867), 18 Id. 303.

In *New York*, the early case of *Van Valkinburgh* v. *Watson et al.* (1816), 13 Johns. (N. Y.) 430, was an action against the father to recover for a coat supplied to his son. The law was declared thus: "A parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglects that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit, must be acquainted with, at his peril. * * Where the infant is *sub potestate parentis*, there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to, the parent." There being no evidence to charge the father with any neglect of duty, the Court held him not liable.

In the matter of Ryder (1844), 11 Paige (N. Y.) 185, the Chancellor refusing the petition of an infant twenty years of age for maintenance, support and education out of his mother's separate estate, his father being dead, and she having married again, says: "A parent who has the means, is undoubtedly bound to support his or her minor child, that is, to afford a bare support. The law, however, gives to the parent a corresponding right to the services of the child while such support is afforded; for the parent is not bound to support his children in idleness, even if his property is sufficient to enable him to do so. * * A stranger may furnish necessaries for the child, and recover of the parent compensation therefor, where there is a clear and palpable omission of duty, on the part of the parent, in supplying a minor child with necessaries," and cites *Van Valkinburgh* v. *Watson*, *supra*, in support of his contention. He further states that "the neglect of a parent to provide for his infant child of tender years, and who is incapable of providing for himself, is an indictable misdemeanor," and relies upon *Rex* v. *Friend* (1802), Russ. & Ry. C. C. 20. The Chancellor, however, made an exception in this case on the ground of the son's age, and his being able to support himself by his own industry.

In the case of *Raymond* v. *Loyl* (1851), 10 Barb. (N. Y.) 483, the action was to recover for clothing supplied to the defendant's infant child; the Court below found for the plaintiff, but on appeal HAND, J., said: "A parent is under a natural obligation and duty to furnish necessaries for his infant children. How that obligation is to be enforced, is not so clear." He cited the language of SPENCER, C. J., in *Edwards* v. *Davis* (1819), 16 Johns. (N. Y.) 285, (where the action was to recover for necessaries furnished to the defendant's parents, and judgment was given for defendant) to the effect that "it is a perfect common law duty." After an examination of these principles and of the cases which support them, the learned Judge added, "though stated so broadly, and by such eminent jurists, an examination of the cases, throws doubt upon this position." The Court therefore held the defendant was not liable, there being no legal obligation independent of statute, unless there be

an express or implied contract, which could not be, where the infant leaves the parent's home contrary to such parent's wishes, as was the case in that suit.

Chief Justice J. SMITH in *Cromwell* v. *Benjamin* (1863), 41 Barb. (N. Y.) 558, in affirming the judgment of the Court below, which was for the plaintiff, the action being to recover for goods supplied to the defendant's wife and child, looked upon the liability of a parent to supply necessaries for his minor children as analagous to that of a husband to support a wife; he says: "The liability of the defendant to furnish necessaries for his son who was a minor, and for his daughter, who although a few years past her majority, was unmarried and a member of his family, and who, as appeared * * was an invalid unable to support herself by her labor, springs from the relation of a parent to his offspring, and depends upon principles analagous to those above considered in respect to his liability to support his wife."

"The right of parents," says Justice ALLEN in his dissenting opinion in *Furman* v. *Van Sise* (1874), 56 N. Y. 445, where the action was brought by the mother, the father being dead, for the seduction of her daughter, and the judgment of the Court below in favor of the plaintiff was affirmed, "to the services of their children results from their duties; and the duty of the father to support his infant child is absolute, irrespective of the means of the child or his ability to care for himself; and from this results the absolute right to the services of the child during his minority." This would appear to be in conflict with *In the Matter of Marx* (1878), 5 Abb. N. C. (N. Y.) 224, where the Court, in suit for an account of the moneys which came to the defendant's hands as his wife's administrator, which he claimed to have expended upon the children, held a father was not bound to support his infant children, where they have property that may be applied for that purpose.

In the more recent case of *Parker* v. *Tillinghast* (1887), 19 Abb. N. C. (N. Y.) 190, the defendant's infant son, away at school, contracted a debt for clothes and an overcoat, it being winter, for which suit was brought against the defendant, the father, who was held liable, the Court saying: "The defendant's liability * * springs from the relation of the parent to his offspring, and is founded on a moral duty to furnish necessaries for his infant children according to his means."

In *North Carolina*, in *Walker* v. *Crowder* (1843), 2 Ired. Eq. (N. C.) 478, where the question was raised as to the right of the sureties under the father's guardian bond, to come in under a deed of assignment executed by the father for the benefit of his creditors, the Court refused to allow deductions by the father on account of the education of the children because "It was, by the settled rule of our Courts the duty of * * [the] father, to maintain his children, if of ability; and, if not, he should have the sanction of the proper court to an application of the children's property to that purpose."

In *Ohio, Trustees of Jefferson Township, &c.* v. *The Trustees of Letart Township* (1827), 3 Ohio 99,

was a suit between two townships to recover moneys expended in the support of a minor whose father was dead. There the law is thus stated: "The parent is bound both by the laws of nature and the laws of the land, to provide for and take care of his infant child, and in return is entitled to the services and control of the child. This right is so perfect that, unless in extraordinary cases, it cannot be interfered with." The son had left his father without cause, and the Court found for the defendant township.

In *Pretzinger* v. *Pretzinger* (1887), 45 Ohio St. 452, wherein the defendant was, after proceedings and decree in divorce, held liable for the support of his minor children upon the wife's action, Justice DICKMAN says: "The duty of the father to provide reasonably for the maintenance of his minor children, if he be of ability, is a principle of natural law. And he is under obligation to support them, not only by the laws of nature, but by the laws of the land. * * This natural duty is not to be evaded by the husband's so conducting himself, as to render it necessary to dissolve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties; or to enable the father to convert his own misconduct into a shield against parental duty."

The question of the liability of the father upon his infant children's contracts was brought before the Supreme Court of *Oregon*, in *Carney* v. *Barrett* (1871), 4 Or. 171, a suit to recover for board and lodging of the defendant's son. The judgment of the Court below, which was for the plaintiff, was reversed, and the law thus stated: "In general a father is not liable on a contract made by his minor child, even for necessaries furnished, unless an actual authority is proved, or the circumstances be sufficient to supply one." Here, however, the plaintiff had disregarded the defendant's notification that he would not be liable.

In *Gerber* v. *Bauerline* (1888), 17 Or. 115, a suit against a guardian, who was also the step-father of the plaintiff, for an account, the Court said: "If a step-father voluntarily assumes the care and support of a step-child, he stands *in loco parentis*, and the presumption then is, that they deal with each other as parent and child, and not as master and servant, and in such case the ordinary rules applicable to parent and child will apply." In this case he did not act so as to stand *in loco parentis*, and was allowed to charge the estate with maintenance and support.

In *Fitler* v. *Fitler* (1859), 33 Pa. 50, suit was brought against the defendant to recover money expended by the plaintiff in the support and maintenance of the defendant's minor son. It appeared that the husband had obtained a decree in divorce against the wife, who had deserted her husband before the birth of the child, and had since retained the custody thereof, supporting and maintaining it, though the father had offered to take the boy and support him. The Court below found for the defendant, and Chief Justice LOWRIE in affirming the judgment, said, "When a man abandons his child and casts it upon the public, he be-

comes liable for its support. But it is entirely impossible to treat a child as thus cast on the public, when the fact simply is, that the mother has deserted the father, and carried away the child and continues to support it. This is merely leaving it with her, until she chooses to restore it; and while she keeps it on such ground, she has no claim for compensation."

In *Gill* v. *Read* (1858), 5 R. I. 343, where the husband and wife lived separate and apart from each other, the wife having the custody of the child, the husband was held liable for necessaries furnished for such child, the Court saying: "If * * he suffer his child to live separate from him with her, he thereby constitutes her his agent to contract for the child's necessaries, and is liable to those who furnish them upon his credit."

In *Tennessee*, the position of a father toward his minor children is thus stated by Justice McKINNEY in *Maguinay* v. *Sandck* (1857), 5 Sneed (Tenn.) 146, where the plaintiff was allowed to recover for the seduction of his minor step-daughter: "By the common law the husband is the sole and absolute head of the family; and of this character and relation, with its attendant rights and obligations, he cannot be divested—in the absence of mental or moral incapacity—during the continuance of the matrimonial union, as respects the wife, or the minority of his children as respects them. The separate legal existence and authority of the wife is suspended, and neither she, nor the minor children, can do any act, except by his authority expressed or implied, to bind him or prejudice his rights, so long as he reasonably discharges his relative duties towards them, according to his circumstances and condition in life. As husband, he is absolutely bound to provide reasonably for the support of his wife; and as father, he is in like manner bound to provide for the maintenance and education of his children, during their minority, if of sufficient ability. As head of the family, he alone is responsible in law, for the proper control and government of his household; he alone is punishable for its misgovernment or disorder, even though the wife or family may be the cause of disorder. The husband is not by law, bound to maintain a child of the wife by a former husband. But if he receives such child into his own house, he is then considered as standing *in loco parentis*, and is responsible for the maintenance and education of the child so long during its minority, as it lives with him, for by so doing, he holds the child out to the world as part of his family. This is precisely the obligation of a father, as respects the support of his minor child." The case of *Norton* v. *Ailor* (1883), 11 Lea (Tenn.) 563, where a step-father's suit against the administrator of his infant step-daughter's estate, for compensation for support, was dismissed by the Court, supports and approves the law as thus stated.

In *Texas*, *Fowlkes* v. *Baker* (1867), 29 Texas 135, was an action where the plaintiff recovered from the father the price of goods supplied to his infant son. Justice WILLIE, in delivering the opinion of the Court, says: "Much conflict of authority exists as to the ground upon which rests the legal liability of a father for necessaries furnished

his infant child. Some insist that it grows out of the natural duty of the parent to provide sustenance and support for his offspring; others say, that it is a question of agency and authority, and that a parent is only bound for such articles as are furnished with his consent express or implied. * * The result of all the authorities seems to be properly laid down by Parsons in his treatise on Contracts, vol. 1, p. 253, 'That where the goods are not necessaries, the father's authority must be proved to render him liable; where they are necessaries, the father's authority is presumed, unless he supplies them himself, or was ready to supply them. Where the infant lives with the father, or under his control, his judgment, as to what are necessaries, will be so far respected, that he will be held liable only for things furnished to the infant to relieve him from absolute want. Where the infant does not live with the father, but has voluntarily left him, the authority of the father must be strictly proved, unless, perhaps in cases of absolute necessity, and where he has been deserted by the father, or driven away from him, either by command or cruel treatment, then the infant carries with him the credit and authority of the father for necessaries.' * * The authority to make * * * the purchases must be proved in the one case, and in the other it is inferred, unless rebutted by circumstances showing that the parent had supplied the infant himself, or was ready to supply him." In the more recent case of *Buckley's Adm'r* v. *Howard & Wife* (1871), 35 Texas, 565, suit was brought to recover moneys due the plaintiff for the hire of slaves bequeathed by her mother, to her and her brother; the defendant, the administrator of her deceased father's estate, claimed to set off the expenses of her nurture and education. The Court held that "the father and natural guardian, was bound by the obligations both of law and morality to raise and educate his children at his own expense," and further, that "the law gave no right to him to deduct from or cut down [a] legacy which they received from their mother, for this purpose," and gave judgment for the plaintiff.

The *Vermont* cases support the theory that the obligation is a moral one. Thus in *Gordon* v. *Potter* (1845), 17 Vt. 348, the son, a minor, was at work by permission of the father, the defendant, who told him to go to work, and promised to get him some clothes in the fall. The father knew of a purchase of clothes made by his son, and had furnished him with one dollar to pay for making them up, permitted him to wear them out, and gave him part of his earnings. The Court below rendered judgment for the defendant, to which the plaintiff excepted. The opinion of the Court, affirming that of the Court below, was delivered by Justice REDFIELD: "It does not appear, except by way of inference, that the articles charged were furnished upon the credit of the father, or, in other words, that the plaintiff, at the time they were delivered to the son, expected the father to pay for them. And I take it to be well settled law, that, if one trades with the son, and gives credit to him alone, knowing all the facts in the case, he can never, after that, sustain an action against the father for articles thus deliv-

ered. And this upon the ground, that, if one trade with the agent, and give credit to him personally, knowing of his agency, the principal is not liable. * * It does not appear that the father ever gave the son any authority, either expressly, or by implication, to pledge his credit for the articles; but the contrary. And unless the father can be made liable for necessaries, for his infant child, against his own will, then, in this case, the plaintiff must fail to recover. I know there are some cases, and *dicta* of Judges, or of elementary writers, which seem to justify the conclusion, that the parent may be made liable for necessaries for his child, even against his will. But an examination of the cases upon this subject will not justify any such conclusion." Proceeding, he takes objection to the law as defined by Chancellor KENT, *supra*, page 28, and remarks that the case of *Van Valkinburgh* v. *Watson* (1816), 13 Johns. (N. Y.) 480, "was in favor of the father. The Court [in that case] say, indeed, that, had he absolutely refused to furnish necessaries to his minor child, he might be made liable for them, when furnished by a stranger. But the decision involved no such question, and called for no such declaration." With regard to the case of *Stanton* v. *Wilson* (1808), 3 Day (Conn.) 37, he remarks that the rule laid down therein "is broad enough to make the father liable against his will," but he points out that in that particular case "the necessaries had been furnished to the child by consent of its legally constituted guardian, the mother, after a divorce *a vinculo*." And concludes his criticism by saying: "But, notwithstanding the usual accuracy of the learned commentators referred to, [KENT and SWIFT], it needs no further argument to show, that their opinion, on this point, is without the support of any decided case." He then reviews the English authorities very fully, and concludes by saying: "A father, who supports his family, ought, it would seem, to be consulted as to the mode in which it shall be done; and, if he will not support them, 'being of ability,' the statute points out the remedy the same in this State as in England. I know the law is different as to the wife, and there are substantial reasons why it should be. She may always buy necessaries on her husband's credit, if he turn her off, without her fault, or refuse to find her a suitable maintenance at home."

In *Varney* v. *Young* (1839), 11 Vt. 258, the defendant had relinquished all claim to the services of his minor son, and allowed him to act for himself, and stated that he would pay none of his debts. The son entered into an agreement to serve the plaintiff as his apprentice, under which agreement he continued to serve until he was taken sick. The action was brought by the plaintiff, the master, for the expenses of his sickness. It appeared that prior to the statement made by the father that he would not be responsible for the son's debts, the father had requested a certain other party to see, in the event of his son's sickness, that he was taken care of, and promised to pay the expenses of his sickness, and that such person had, during the son's illness, visited him and requested the plaintiff to take care of him, and told him that the defendant would pay him. Justice BENNETT, in delivering the opinion of the

Court, states the law to be "well settled, that a father is not bound to pay for necessaries furnished to his minor son, unless an actual authority be proved, or the circumstances be sufficient to imply one. There must be proof of a contract *express* or *implied*, a *prior authority*, or a *subsequent recognition* of the claim." The Court held that there was no contract express or implied on the father's part, and that the father having previously notified the plaintiff that he would not be liable, the action could not be sustained.

In *Swain* v. *Tyler* (1853), 26 Vt. 9, the defendant had made a contract with his minor son, then nineteen years of age, whereby for a valuable consideration he relinquished to the son all his future earnings, and the son promised to take care of himself and not to call upon the defendant, his father, for further aid. The defendant subsequently published a notice of this agreement in a local paper, stating that he would not be responsible for his son's debts. The son left his father and worked on his own account, until overcome by sickness, when he returned, and without his father's knowledge, sent for the plaintiff, a physician, to attend him. The son was attended by the plaintiff, who, having no notice or knowledge of the agreement or of the notice published, charged his bill to the defendant. Chief Justice REDFIELD there says: "The father knew of the services rendered, and made no objection, but did not, * * assent to their being done on his credit, either expressly or impliedly, in fact. Under these circumstances the only question is, whether the law implies a promise to pay—we think it does, on the ground, that while one's minor children remain a part of his family and household, and receive necessaries, with the knowledge of the father and without objection, on his part, it is the same thing as if he received them himself, or his wife received them." The judgment of the Court below, which was for the plaintiff, was therefore affirmed.

In *Virginia*, the Court upholds the rule that "A father, if of ability, is bound to maintain his infant children, even though they may have property of their own": *Evans* v. *Pearce et als.* (1860), 15 Grat. (Va.) 513, followed in *Griffith et al.* v. *Bird et als.* (1872), 22 Id. 73. In the former case the suit was for an account against the father's administrator, the father being guardian *de facto*, having received the rents and profits of the property, and the question being whether any allowance should be made for his support and maintenance of such children out of the estate. The father being able to support his children, nothing was allowed out of the estate therefor. In the latter case, the father was the guardian of his infant children, and maintained them at his own expense. On his death, his creditors sought to charge his children in the administration account, with the expenses of their maintenance, but the Court held they could not be so charged, and cited and approved of *Evans* v. *Pearce*, *supra*.

In *Wisconsin*, the father is bound to support his minor children. This is clearly stated by the Court in *McGoon* v. *Irvin* (1845), 1 Pin. (Wis.) 526, where suit was brought to recover for the support, education and instruction of the defendant's infant children, and judgment

was given for the plaintiff: "By every principle of law upon the subject, recognized and strengthened by our statute, parents are under legal obligation to maintain and support their children, who are of tender years and helpless. And when a parent permits a stranger to maintain, support and instruct such children, in no way objecting to the act, but rather assenting and advising therein, the law will presume that he knows his obligations, accepts the services and assumes to pay." These principles, although not expressly decided in *Carpenter* v. *Tatro* (1874), 36 Wis. 297, are supported thereby. In that case there had been a decree *a vinculo*, the children remaining with the father; subsequently the mother married again, and one of the children left his father's home, through ill treatment, and resided with his mother, whose second husband supported it. The husband assigned his claim for its maintenance to the wife, who brought suit against the former husband, the father of the child. Her claim, however, was disallowed, upon the ground (*inter alia*) that it was not shown that she had purchased the debt with her separate estate. There the Court say, "If he was driven away by cruel treatment, there is very high authority for holding that the defendant was under a legal liability to pay for his support. It is true, there is a conflict even upon this question, as an examination of the authorities cited * * * shows. But admitting the legal liability of the defendant, and that the facts disclosed bring the case within the decisions which enforce the liability, still there is an insuperable difficulty in the way of a recovery in the present action." The difficulty lay in the reasons above stated.

In conclusion, it will be seen that all the States support the obligation as one imposed by the law of nature, and as being a moral obligation; but they are by no means unanimous in holding that such duty is also imposed upon the father by the common law. The weight of the authorities would, however, seem to be in favor of holding the duty to be one enforceable at common law as a duty cast upon the father thereby, and thus support and sustain the decision of the Court in the principal case.

It is supported as a legal duty in Alabama (*supra*, page 31), Connecticut (33), District of Columbia (34), Georgia (34), Iowa (37), Kentucky (39), Maine (40), Maryland (41), Massachusetts (42), Michigan (42), Minnesota (43), Mississippi (43), Missouri (44), North Carolina (49), Ohio (49-50), Tennessee (51), Texas (51-52), Virginia (54), and Wisconsin (54-55), and it would seem to be the same in Arkansas (31-32). While in California (32), and Louisiana (40), the duty is, by the Civil Code of each State, cast upon both parents alike.

In Illinois (35), Indiana, independent of statute, (36), New Hampshire (44-45), and Vermont (52), it is considered as a mere natural duty, while in New Jersey (45-47), and New York (48-49), there would seem to be a conflict of opinion.

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